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Why Protect Political Art as Political Speech

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Why Protect Political Art as "Political Speech"?

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Introduction

It may seem obvious that the First Amendment protection due political speech not be diminished in any way merely because the political message is rendered through artistic expression. But art can be a difficult concept for governmental officials, judges, and the general public to understand. To many, the idea that art is something worthy of constitutional benevolence is foreign. As the First Amendment Center's annual survey has revealed, less than 50 percent of those polled in 1997, 1999, and 2000, 2002 and 2003 believed that people should be allowed to display in a public space art that has content that might be offensive to others.[1] And as recently as 1996, the City of New York, perhaps this country's cultural capital, urged a court, unsuccessfully, to find that because some artwork purportedly failed to communicate ideas it should receive very limited First Amendment protection.[2]

Politics and art have always been a volatile mix. But doctrinally that volatility has been productive. The capacity for artistic expression to relay political thought—and the history of art being a medium for political commentary and debate—was central to the gradual recognition by the United States Supreme Court of what has become a vigorous First Amendment protection for almost every medium of artistic expression.

Nevertheless, the appearance of overtly political art has brought about numerous legal challenges to freedom of artistic expression founded on the belief by government that art funded or exhibited by a public agency should be devoid of political or any "controversial" thought, and be rather merely aesthetically pleasing.

These incidents require a consideration of a fundamental question: why is artistic expression entitled to such strong constitutional protection? Is it only because of art's capacity for communicating ideas? Or is art protected simply for art's sake, regardless of whether there is a discernible message being expressed?

Hazards abound in each choice. In protecting art only because it communicates articulable ideas, one threatens to exclude art the communicative aspect of which is more elusive. And in including all art, one will inevitably force before courts the thoroughly undesirable threshold question of "what is 'art'?"

1. First Amendment Center, *State of First Amendment*, 28 (2003) *available at* http://www.freedomforum.org.

2. Bery v. New York, 97 F.3d 689, 695 (2d Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997) (overruling Bery v. New York, 906 F. Supp. 163, 168 (S.D. N.Y. 1995)).

This article will consider these issues in the context of legal conflicts that have arisen when government funds the creation or presentation of art. This article will first review the evolution of the First Amendment doctrine of freedom of artistic expression. This article will then consider a district court decision regarding the Esperanza Peace and Justice Center which directly addressed the question of political advocacy in artistic expression.

What is learned is that artistic expression is treated somewhat differently than other forms of speech. Art is protected "speech" even if it contains no readily discernible message. But when art does contain a discernible, political message it certainly should not be penalized.

I. The Supreme Court Had Established Previously that Artistic Expression, Across All Arts Media, is Protected by the First Amendment

That art might be deserving of constitutional protection is a relatively recent jurisprudential development. With the exception of literature,[3] the Supreme Court did not contemplate whether artistic expression was "speech" as used in the First Amendment until less than fifty years ago.

Artistic performances were deemed to be insufficiently expressive when first examined by the Supreme Court in 1915. In *Mutual Film Corp. v. Indus. Comm'n*,[4] the Supreme Court rejected the plea that an Ohio statute that empowered a board of censors to approve for exhibition only those films that were "of a moral, educational, or amusing and harmless character" violated the freedom of speech as guaranteed by the Ohio Constitution.[5] The Court held that the exhibition of movies was:

3. *See* Kaplan v. California, 413 U.S. 115, 119 (1973) ("A book seems to have a different and preferred place in our hierarchy of values, and so it should be."). Generally, early First Amendment cases treated the written word as coming under the protection of the freedom of the press clause and the spoken word as coming under the freedom of speech clause.

4. 236 U.S. 230, 244 (1915).

5. The First Amendment to the U.S. Constitution was applied only to the federal government until 1925. In Gitlow v. New York, 268 U.S. 652, 666 (1925), the Supreme Court held for the first time that the freedom of speech guaranteed by the First Amendment was within the liberties safeguarded by Due Process Clause of the 14th Amendment and thus protected against actions by state governments as well. As a result, before 1925, cases challenging state laws abridging the freedom of speech were brought solely as challenges to the free speech clauses of state constitutions rather than the First Amendment to the U.S. Constitution.

> [A] business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, not intended to be regarded by the Ohio Constitution, we think, as part of the press of the country, or as organs of public opinion.[6]

By implication, the Court's reasoning applied as well to other artistic presentations deemed "spectacles," presumably live performances that were considered to be primarily pleasing to the eye rather than a vehicle for opinion.[7]

It was not until 1952 that the Court forsook that ruling and found that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."[8]

The idea that all artistic expression was under the aegis of the First Amendment concretized in the Supreme Court in the 1970s. This occurred not so much as a result of specific media of expression being before the Court but as a general recognition of the expressive quality of art. Thus, the Supreme Court stated the constitutional protection due the visual arts—"pictures, films, paintings, drawings, and engravings"—as a given, in a case in which it examined whether an un-illustrated book, thus characterized by its absence of visual art, was legally obscene.[9]

Perhaps most significantly, the Supreme Court set forth that "serious artistic value" was one of the factors—along with literary, political, and scientific value—that distinguished "obscenity," which is not protected by the First Amendment, from protected sexual material.[10] From here on out a court could look at art not only as a

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6. *Mutual Film Corp.*, 236 U.S. at 244.

7. *Webster's Revised Unabridged Dictionary* (1913) defined "spectacle" as "something exhibited to view; usually, something presented to view as extraordinary, or as unusual and worthy of special notice; a remarkable or noteworthy sight; a show; a pageant; a gazingstock," and listed "show; sight; exhibition; representation; pageant" as synonyms.

8. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

Although film maybe considered to be a relatively new medium for artistic expression, almost all of the jurisprudence declaring that art is protected by the Fist Amendment flows from that case.

9. Kaplan v. California, 413 U.S. 115, 119-20 (1973). The Supreme Court had earlier acknowledged, although not in an arts context, that visual images are "a primitive but effective way of communicating ideas . . . a short cut from mind to mind." W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

10. Miller v. California, 413 U.S. 15, 24 (1973). The Court set out a three pronged-test for determining obscenity: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* (citations omitted). The third prong of the test replaced an earlier and more expansive requirement that the

form of expression worthy of First Amendment protection, but indeed as a defining quality of protected speech.

Live theatrical performances received the Court's implicit blessing in 1970.[11] However, the medium's status of deserving full First Amendment protection was not made definitive until some five years later when the Court rejected the argument that live performance was more conduct than expression:[12]

> By its nature, theater usually is the acting out—or singing out—of the written word, and frequently mixes speech with live action or conduct. But that is no reason to hold theater subject to a drastically different standard.[13]

However, the Supreme Court still stopped short of announcing a rule that all artistic expression was within the First Amendment. The Court noted instead that "[e]ach medium of expression, of course must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."[14]

Nevertheless, despite this caution, and perhaps because in hindsight it seemed foolish to have waited so long, the Court quickly came to regard artistic expression as an ages-old component of protected speech. As it wrote less than ten years later:

> By excluding live entertainment throughout the Borough, the Mount Ephraim ordinance prohibits a wide range of expression that has *long been held* to be within the protections of the First and Fourteenth Amendments. Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.[15]

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material be "utterly without redeeming social value." *Id.* at 24-25 (rejecting the test set forth in *Memoirs of a Woman of Pleasure v. Massachusetts*, 383 U.S. 413, 419 (1966)).

11. Schacht v. United States, 398 U.S. 58, 63 (1970) ("An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech.").

12. Previously, the Court, considering the constitutionality of an ordinance that prohibited sexually explicit live performance in places where alcohol was served, acknowledged that "theatrical productions are within the protection of the First and Fourteenth Amendments." California v. LaRue, 409 U.S. 109, 116-17 (1972). However, the Court had cautioned that "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulation significantly increases." *Id.* at 117.

13. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1975) (considering the denial of a permit to stage a production of Hair at two Tennessee theaters). Notably, the Court also described two municipal theaters as "public forums designed for and dedicated to expressive activities." *Id.* at 555.

14. *Id.* at 557.

15. Schad v. Mount Ephraim, 452 U.S. 61, 65 (1981) (emphasis added).

By the time the Supreme Court was presented with its first opportunity to discuss the extent to which government could regulate certain aspects of a musical performance, it was not contested that "[m]usic, as a form of expression and communication, is protected under the First Amendment."[16] And by 1995, the Court had realized the "unquestionable" First Amendment protection due even abstract works.[17]

A. Art Was Protected as Speech Because of its Capacity to Communicate Ideas, Particularly Political Ideas

The Supreme Court's acceptance of artistic expression as within the liberty of free speech afforded by the First Amendment was founded on the recognition of a very basic concept that was perhaps more obvious in the arts community than in the legal one. In most of the cases discussed above, the Supreme Court reasoned that artistic expression should be constitutionally protected because art not only communicates ideas, but because it is very often a powerful medium for conveying political beliefs.[18]

As the Supreme Court stated in the seminal case regarding artistic expression:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.[19]

The Court also relied on its previous observation about literary works that "[e]veryone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."[20]

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16. Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

17. Hurley v. Irish-American Gay Group of Boston, 515 U.S. 557, 569 (1995).

18. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 739-40 (1992) (noting that art has been a "frequent target of political repression by totalitarian governments, reflecting those governments' judgments that it is a forum for dissent and opposition"); Barbara Hoffman, *Law for Art's Sake in the Public Realm*, 16 COLUM.-VLA J.L. & ARTS 39, 45, 65 (1991) ("It is difficult to draw a bright line between art that communicates political ideas and art that does not.").

19. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

20. Winters v. New York, 333 U.S. 507, 510 (1948). *See also* Schacht v. United States, 398 U.S. 58, 63 (1970), in which the Court noted that the First Amendment rights afforded an actor included "the right openly to criticize the Government during a dramatic performance"; Farmers Educational & Coop. Union v. WDAY, 360 U.S. 525, 529 (1959)

Similarly, in discussing music, the Court focused on that medium's historic role in political discourse and the necessity of protecting such expression to preserve a democratic system:

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state.[21]

Other courts have echoed the high court's observations. The Second Circuit in explaining "the essence of visual communication and artistic expression," stated:

> Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection. . . . The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language group to both the educated and illiterate. . . . One cannot look at Winslow Homer's paintings on the Civil War without seeing, in his depictions of the boredom and hardship of the individual soldier, expressions of anti-war sentiments, the idea that war is not heroic.[22]

The California Supreme Court emphasizing art's long historical role in public debate noted that "[l]ong before the advent of printing and motion pictures the theater constituted 'a significant medium for the communication of ideas.'"[23] As that court explained:

> Use of the theater to depict current events, as distinguished from religious pageantry, was first attempted by Aeschylus, and refined by Euripides and later by Aristophanes who mastered comedy. . . .
>
> Fear of the political potential of the potential of the theater was manifest when James I published an ordinance forbidding representation of any living Christian king upon the stage. Since 1624 the lord chamberlain has had censorship control of the English theater.[24]

This line of reasoning is consistent with the way the Court has, for the purposes of the First Amendment, identified "speech" in other contexts. In defining the concept of symbolic speech, the Court

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(noting that the "art of radio broadcasting" is an important medium for delivering political messages).

See also Sefick v. City of Chicago, 485 F.Supp. 644, 652 n.19 (1979) (finding that a sculpture criticizing the mayor's snow removal efforts "possessed socio-political content" and finding it significant for First Amendment purposes that it was obscured in an attempt to silence this expression).

21. Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

22. *Bery*, 97 F.3d at 695.

23. Barrows v. Municipal Ct., 1 Cal. 3d 821, 824, n.4 (1970) (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952)).

24. *Id.*

has strived to determine whether the conduct is "sufficiently imbued with elements of communication."[25]

B. Artistic Expression is Also Protected for its Own Sake Even if it Communicates No Articulable Message

However, the Supreme Court has also made clear that art is "speech" protected by the First Amendment even if it is not so "imbued" with communicative elements. Art is thus not merely a subcategory of "conduct," which is included in the First Amendment only if it is "expressive" or "symbolic."

Rather as the Court wrote in *Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston, Inc.*:

> [A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particular message,' would never reach the unquestionably shielded paintings of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll.[26]

Indeed the Court contemplated such a result as early as 1948. In considering whether "pulp" literary works that were arguably not "informative" were also protected by the First Amendment it rejected the assertion that "the constitutional protection for free press applies only to the expression of ideas" and noting that the "line between the informing and the entertaining is too elusive for the protection of that basic right."[27] In contrast, in the first half of the twentieth century, courts tended to focus on whether the written work had some societal value.[28]

Treating artistic expression differently than other expression makes sense. If art were protected as "speech" *only* because it communicates ideas or can be politically effective, we risk art not being valued solely for its contribution to society—art for art's sake—but only because it is more concretely functional. Such an approach threatens the exclusion of art the communicative aspect of which is

25. Spence v. Washington, 418 U.S. 405, 409 (1974).

26. 515 U.S. 557, 569 (1995); *See also* Piarowski v. Illinois Community College, 759 F.2d 625, 628 (7th Cir. 1985)("[T]he freedom of speech and of the press protected by the First Amendment has been interpreted to embrace purely artistic as well as political expression.").

27. Winters v. New York, 333 U.S. 507, 510 (1948).

28. *See* Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals.... The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.").

not as readily appreciated.[29] Moreover, a court may be forced to consider the communicative value of each piece of art before it to determine to which level of constitutional protection it is entitled.[30]

Indeed, courts have struggled with the "communicative aspect" of art. A federal appeals court reversed a trial court's finding that artist Chuck Close's First Amendment rights had been violated when the University of Massachusetts removed his paintings from the corridors of the student union because they were thought to "inappropriate."[31] The appeals court rejected Close's contention that art is as fully protected by the Constitution as political or social speech, finding instead that the protection due speech depends not on the medium of expression, but on the subject matter.[32] The court found that "[t]here is no suggestion, unless in its cheap titles, that plaintiff's art was seeking to express political or social thought" despite the fact that the paintings addressed the social issues of juvenile sexuality and sexual abuse.[33]

And even the *Bery* court, despite its glowing language about visual art,[34] distinguished the visual art at issue before it from craft arts such as silversmithery and pottery because the latter lacked communicative aspects. "While these objects may at times have expressive content, paintings, photographs, prints and sculptures . . .

29. "The Court's treatment of the Speech Clause tends to devalue the extrarational, nondiscursive elements of art because its doctrine places so much freight upon ideas. . . . The marketplace of ideas paradigm, which permeates the speech cases, tends to undervalue art by only recognizing its political, rational, discursive potential." Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 105-12 (1996) (describing the Supreme Court's treatment of art before *Hurley*).

30. Hamilton, supra note 29, at 109.

31. Close v. Lederle, 424 F.2d 988, 989 (1st Cir. 1970). The specific legal holding of *Close*, that Close's First Amendment rights were outweighed by the rights of those who were forced to see his paintings, has been called into serious question following later Supreme Court cases such as *Cohen v. California*, 403 U.S. 15, 21 (1971) (holding that an individual had a First Amendment right to wear a jacket with "Fuck the Draft" written on it in a courthouse despite the captive audience) and others discussed herein.

32. "Plaintiff makes the bald pronouncement, 'Art is as fully protected by the Constitution as political or social speech.' It is true that in the course of holding a motion picture entitled to First Amendment protection, the Court said that moving pictures affect public attitudes in ways 'ranging from direct espousal of a political or social doctrine to the subtle reshaping of thought which characterizes all artistic expression.' However, this statement in itself recognizes that there are degrees of speech." *Close*, 424 F.2d at 989-90 (citations omitted).

33. The "cheap titles" specifically referred to by the court were "I'm only 12 and already my mother's lover wants me" and "I am the only virgin in my school." *Id.*

34. *See Bery*, 97 F.3d 689.

always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection."[35]

Dance as a medium has proved to be quite problematic.[36] Although the Supreme Court has not had the occasion to discuss ballet, classical or modern dance performance, it has many times considered the expressive elements in nude dancing in "adult entertainment establishments." The Supreme Court has found that nude dancing is somewhat expressive, but the effect has been only to salvage a small modicum of First Amendment protection for the medium rather than elevating to the level as other performing arts.[37] However, even in the non-"adult" setting, the Court has not proved much more accepting of dance's expressive elements. The Court, in finding that "recreational dancing," in that case between 11-14 year olds at a dance hall, was not sufficiently expressive as to be entitled to First Amendment protection, apparently did not believe dance to have any expressive element to set it apart from other "activity."[38]

However, there are also pitfalls to be encountered in treating all art as inherently expressive even if it communicates no articulable message. In such situations, courts will inevitably be forced into the thoroughly impossible legal question of "is this art?" As the definition of art has been historically elusive, this model would indeed be problematic.[39]

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35. *Id.* at 696.

36. Hamilton, supra note 29, at 109 n.140.

37. *See* City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (explaining that "nude dancing of the type at issue here is expressive conduct that falls only within the outer ambit of the First Amendment's protection"); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991); Schad v. Mount Ephraim, 452 U.S. 61, 66 (1981); California v. LaRue, 409 U.S. 109 (1972).

Anthropologist Judith Lynne Hanna, Ph.D. has written extensively on the expressive elements of nude dancing and frequently provides expert testimony regarding the artistry of exotic dance. Judith Lynne Hanna, *Analysis: The First Amendment and Exotic Dance*, NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION QUARTERLY 8, Autumn 1998.

38. City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) ("[I]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."). *Cf.* Bella Lewitzky Dance Co. v. Frohnmayer, 754 F.Supp. 774, 783 (C.D. Cal. 1991) (assuming without discussing that fine art dance was artistic expression entitled to First Amendment protection).

39. Compare this impossible question to the "serious artistic value" determination in obscenity cases. Although arts professionals are able to articulate objective standards for artistic *value*, these standards are readily mishandled in the legal realm. *Cf.* Advocates for the Arts v. Thomson, 532 F.2d 792, 797 (1st Cir. 1976) ("This is not to say that the standard of artistic merit is not an important goal, but only that it and guidelines elaborating it do not lend themselves to translation into first amendment standards.")

The practice of tattooing is an interesting illustration of this conundrum. State courts have split on whether the conduct of tattooing, as opposed to the tattoo itself, should be treated as artistic expression. A Massachusetts court, applying *Hurley*, held that the act of tattooing was the equivalent of creating artwork and was thus protected by the First Amendment in the same way other creative conduct was.[40] However, the South Carolina Supreme Court, relying on Spence's requirement that conduct be "'sufficiently imbued with elements of communication,'" struck down a similar ban.[41] It found that "the process of injecting dye to create the tattoo is not sufficiently communicative to warrant protections."[42]

II. Where the Problems Arise: Political Spaces and Publicly Funded Programs

A. Public Funding of the Arts is No Stranger to Controversy

The fact that our constitutional system embraces art as a mode of political expression is hugely significant. To some it seems art has value only as pretty pictures, as pleasantries. Art censorship incidents frequently arise when this is not so, but rather when art is disturbing or provocative, or when it challenges society's religious, sexual or racial conventions, without being aesthetically pleasing.[43]

The failure to perceive art's non-aesthetic and political roles becomes especially important in the realm of public funding of the arts. Government may be placed in a position of financially assisting the production or presentation of art that criticizes it, or that challenges some of its citizens' moral strictures. In other contexts, these would be the easiest of constitutional questions; the suppression of speech because government disagrees with its viewpoint is the

(citations omitted). In obscenity cases, courts rely on the opinions of arts experts. *See, e.g.*, Luke Records v. Navarro, 960 F.2d 134, 138-39 (11th Cir. 1992) (reversing the findings of a trial judge who had disregarded expert testimony supporting a finding of artistic value and had instead applied his own personal observations). Yet the determination of whether a work is "art" regardless of its "value" is even less susceptible of legal definition.

40. Lanphear v. Mass., Sup. Ct., Suffolk County, Case No. 99-1896-B (2000), at 10 (striking down Massachusetts ban on tattooing).

41. State v. White, 560 S.E.2d 420, 423 (S.C. 2002) (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)) (upholding a ban on tattooing).

42. *Id. See also* State v. Brady, 492 N.E.2d 34 (Ind. App. 1986); People v. O'Sullivan, 96 Misc.2d 52 (N.Y. Sup. App. Term 1978); and Yurkew v. Sinclair, 495 F. Supp. 1248 (D. Minn. 1980) (all upholding restrictions on tattooing).

43. *See generally*, HEINS *infra* note 61.

ultimate First Amendment taboo.[44] But because many perceive even art's communicative aspect as limited, the question is not so easily answered.

Controversies over public funding of the arts abounded in the 1980s and 1990s. A few examples follow.

In August 1993, the Cobb County (Georgia) Commission voted to eliminate the full $110,000 it distributed to local arts organization so that it could avoid supporting work that furthered the "gay agenda." The Commission, responding to local theatrical productions of David Henry Hwang's *M Butterfly* and Terrence McNally's *Lips Together, Teeth Apart*, had sought to restrict its arts funding to programs "that support strong community, family oriented standards." They dropped the funding program rather than face litigation over the constitutionality of the restriction.[45]

Two similar incidents occurred in North Carolina. In April 1997, the Mecklenburg County Commission voted to cut its funding to the local arts council so that it could fund art that promotes "the traditional American values" directly. The commissioners took issue with homosexuality themes in theatrical productions of Angels in America and Six Degrees of Separation. In May 1996, Guilford County commissioners transferred funding from the local arts council to a school-based arts education program because it disapproved of the arts council's support for a theater that had presented *La Cage Aux Folles*.[46]

Out North Contemporary Art Center in Anchorage, Alaska has been the target of similar challenges numerous times. In 1998, the Anchorage Assembly rejected a recommended $22,000 arts grant citing Out North's "controversial" and non-family oriented programming. The previous summer Out North barely avoided a loss of its city social services funding to conduct its summer theater program for at-risk youth. And in 1993 and 1994, the mayor vetoed

44. Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable); Bose Corp. v. Consumers Union, 466 U.S. 92, 95 (1984) ("the principle of viewpoint neutrality . . . underlies the First Amendment").

45. David Greene, *Georgia County Defunds Arts: Homophobia Causes Divisive Debate*, NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION BULLETIN 1, Autumn 1993.

46. David Greene, *Arts Under Attack in North Carolina*, NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION QUARTERLY 4, Summer 1997; David Greene, *County Commission Cuts Arts Funding Over Perverted Sexuality*, NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION QUARTERLY 3, Spring 1997.

grants to Out North, only to have those vetoes overturned by the Assembly.[47]

But one incident in particular, and the resulting litigation, shed interesting light on what can happen when art and politics get mixed n with public money.

B. Esperanza Peace & Justice Center[48]

1. To San Antonio, Politics and Art Do Not Mix

On September 11, 1997, the San Antonio City Council voted to eliminate all city arts funding to the Esperanza Center, an arts organization nationally renowned for combining cultural arts programming with social justice advocacy, from the 1998 budget. Although the City Council gave no reasons for the cut, the decision followed a campaign by a handful of local organizations: the groups characterized Esperanza as promoting "the homosexual agenda," "deviant lifestyles," and being "pro-abortion," and "anti-family values." The city's Cultural Affairs Board, the local agency charged with reviewing arts grant applications, had recommended that Esperanza receive over $62,000.[49] The City Council's action came despite the fact that Esperanza had been rated as a highly qualified applicant by the San Antonio Department of Arts and Cultural Affairs.[50]

That artistic expression may be political advocacy, a concept that as discussed above, has been instrumental in securing a place for artistic expression in the First Amendment, was squarely at issue in this case. During the course of the litigation that ensued, the city claimed, in part,[51] that Esperanza was not an arts organization, but a

47. David Greene, *Out North Stripped of Local Funding*, NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION QUARTERLY 1, Spring 1998; David Greene, *Anchorage Theater Faces Funding Veto*, NATIONAL CAMPAIGN FOR EXPRESSION BULLETIN 1, Winter 1994.

48. The facts of the case are set forth in detail in the court's opinion in *Esperanza Peace & Justice Center v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001).

49. This figure includes funding for the Gay and Lesbian Media Project and VAN, two other arts projects for which the Esperanza Center served as the fiscal agent. In response to the City Council's action, the city's Department of Cultural Affairs also withheld $14,000 Esperanza was to receive through it from the Texas Commission on the Arts. Elda Silva, *Esperanza set to go to court*, SAN ANTONIO EXPRESS-NEWS, August 20, 2000 *available at* http://www.express-news.com.

50. *Id.*

51. The City's primary justification was that Esperanza's funding was eliminated because of a need to fund only basic services. Indeed, as part of the "back-to-basics"

political one.[52] The city claimed that political expression as a whole was not properly subject to arts funding. As Mayor Howard Peak told a local reporter, "they're pushing social causes. And we're talking about arts money, not social causes money."[53]

The evidence adduced at trial made it even more clear that the decision to fund Esperanza was based on the viewpoint expressed in Esperanza's artistic presentations and the feeling that Esperanza was too "political." At the August 2000 trial, several council members asserted that Esperanza was "too political" and thus not truly an "arts" organization. Yet they did not accuse Esperanza of engaging in traditional "political" activity such as campaigning or lobbying. They simply were uncomfortable that Esperanza addressed social issues through its arts programming. One council member testified that although political art is "just the nature of what art is," she believed Esperanza had "overstepped its boundaries" in this way.[54]

It was further revealed at trial that all but two of the eleven council members had no first hand knowledge about Esperanza's

agenda, the City Council cut all arts funding by 15%. However, no other arts organization had its funding zeroed out from the budget, except Esperanza. Silva, *supra* note 49.

52. Mike Greenberg, *Passions, often political, fuel artists' works*, SAN ANTONIO EXPRESS-NEWS, August 22, 2000 *available at* http://www.express-news.com.

The city's claim is belied by the fact that several non-arts organizations, such as the Bexar County Detention Ministries, Jewish Community Center, Social Health and Research Center, and Trinity Episcopal Church, were given arts funding for their arts projects. Indeed, according to the city's own grant-making criteria, the nature of the organization is irrelevant. Trial Testimony of Eduardo Diaz cited in Plaintiffs' Post-Trial Brief 15, *Esperanza Peace & Justice Center et al. v. San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001), *available at* www.esperanzacenter.org/litigation/trial/posttrialbrief/pbrief.html. Maro Robbins, *Esperanza trial focuses on motive*, SAN ANTONIO EXPRESS-NEWS, August 22, 2000 *available at* http://www.express-news.com.

53. Mayor Peak had earlier been quoted in the New York Times as saying, "They seem to go way beyond what people want their money spent on. It is an in-your-face organization." Judith Dobrzynski, *San Antonio cuts subsidies for the arts by 15 percent*, N.Y. TIMES, September 12, 1997.

54. Maro Robbins, *Council defunded Esperanza with little direct knowledge*, SAN ANTONIO EXPRESS-NEWS, August 23, 2000 *available at* http://www.express-news.com.; Associated Press, *Cultural arts group fights city in federal court for funding*, August 23, 2000 *available at* http://www.ap.org. As set out in Esperanza's trial brief, one council member testified that although the political expression was "the nature of art," Esperanza had "overstepped its boundaries." *Id.*

There is some precedent for allowing the government to restrict political expression as a category of expression as long as the government is careful to ban all political content and not just that of a certain viewpoint. *See* Lebron v. National Railroad Passenger Corp., 69 F.3d 650 (2d Cir. 1995) (upholding a policy that historically banned political art from large billboard); Claudio v. United States, 836 F.Supp. 1219, 1227-30 (E.D.N.C 1993) (holding that the federal government could remove a large painting about abortion from the lobby of a courthouse in part because such powerful political speech was disruptive to the functioning of a governmental building).

programming or its grant application, but instead relied on the media coverage and the organized campaign against Esperanza. At least one council member admitted that he voted to eliminate Esperanza's in order to accommodate some constituents' concerns about the gay and lesbian viewpoint expressed in some of Esperanza's art. Almost all admitted that similar concerns controlled their decision.[55]

2. *Arts Funding as a Cultural and Constitutional Conflict:* National Endowment for the Arts v. Finley

By the time the Esperanza incident arose, both the courts and the public discourse were well familiar with arts funding controversies.

The United States Supreme Court's 1998 decision in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), as the culmination of the "culture wars" of the 1980s and 90s was somewhat of an anti-climax. After all, much was at stake. To many, contemporary American art of the late 1980s and early 1990s had become a symbol of the tension found throughout American society between social liberalism and "family values" and Western-centric thought and multi-culturalism. Art had moved from the point of illustrating societal issues such as race, human rights, and gender roles and sexual orientation to being the very stage upon which such issues reached a flashpoint. As a result many saw the lawsuit as a cultural Armageddon.

In its most basic form, *NEA v. Finley*[56] addressed whether language requiring the Chairperson of the National Endowment for the Arts to ensure that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public,"[57] violated the First Amendment. The Supreme Court, overruling two lower federal court decisions, found that it did not.[58]

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55. Trial Testimony of Bannwolf, Webster, Flores, Menendez, Guerrero, and Vasquez cited in Plaintiffs' Post-Trial Brief 13-17, Esperanza Peace & Justice Center et al. v. San Antonio, 316 F. Supp. 433 (W.D. Tex. 2001), *available at* www.esperanzacenter.org/litigation/trial/posttrialbrief/pbrief.html. Maro Robbins, *Esperanza tells of funding cutoff*, SAN ANTONIO EXPRESS-NEWS, August 21, 2000 *available at* http://www.express-news.com; Maro Robbins, *Council defunded Esperanza with little direct knowledge*, SAN ANTONIO EXPRESS-NEWS, August 27, 2000 *available at* http://www.express-news.com.

56. 524 U.S. 569 (1998).

57. *Id.*; 20 U.S.C. §954(d)(1).

58. *Finley*, 524 U.S. at 573, 590.

However, the Court's specific holding is largely fiction. It construed the statute at issue to be constitutional only insofar as it was ineffectual. Were the NEA to actually deny an otherwise qualified grant because it found the proposed work "indecent," the decency and respect clause could face a new constitutional challenge.

Congress added section 954(d)(1) to the enabling statute for the National Endowment for the Arts in 1990. Prior to the amendment, the enabling statute commanded the Endowment to award grants based on "artistic and cultural significance, giving emphasis to American creativity and cultural diversity," "professional excellence," and the encouragement of "public knowledge, education, understanding, and appreciation of the arts."[59]

The Decency and Respect Clause was not Congress's first attempt to impose non-artistic standards on the NEA.[60] The first attempt came in 1984 in response to the NEA's support of a production of Verdi's *Rigoletto* set amid the Mafia. Angered by the use of Italian stereotypes, Representative Mario Biaggi proposed a law that would have prohibited the use of NEA funds "in any matter to denigrate any ethnic, racial, religious, or minority group."[61] The proposed provision was not enacted.

The next efforts to reshape the Endowment's funding priorities were the result of two grants, the subjects of which were soon to become iconic of the culture wars.

In April 1989, the American Family Association attacked the funding of a fellowship program at the Southeastern Center for Contemporary Art, based in Winston-Salem, North Carolina. The Center had awarded a $15,000 fellowship to photographer Andres Serrano and had included his photograph *Piss Christ* in a traveling

59. *Id.* at 573.

60. The National Endowment for the Arts and the National Endowment for the Humanities were established by Congress in 1965 to "foster and support a form of education, and access to the arts and the humanities, designed to make people of all backgrounds and wherever located masters of their technology and not its unthinking servants" and to "help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent." 20 U.S.C. § 951(4), (7). Originally, the Endowment was given wide discretion to award grants. Congress stated only the broadest funding requirements, including "professional excellence," "artistic and cultural significance," and "American creativity and cultural diversity." *Finley*, 524 U.S. at 573.

61. MARJORIE HEINS, SEX, SIN & BLASPHEMY: A GUIDE TO AMERICA'S CENSORSHIP WARS 120-21 (New York: New Press 1993). Heins also notes a previous incident when a Member of Congress complained in 1972 that Erica Jong had received NEA support while she was writing *Fear of Flying*. A legislative fix, however, was not proposed.

exhibit of Serrano's, and the other fellows', work. The photograph depicted a wooden crucifix bathed in shimmering reddish-gold light.[62]

A few months later, controversy arose over "The Perfect Moment," an exhibition of the works of photographer Robert Mapplethorpe organized by the Institute of Contemporary Art at the University of Pennsylvania. The exhibit was funded in part by a $30,000 grant from the NEA. The exhibit included several sadomasochistic and homoerotic photographs that members of Congress were soon to denounce as pornographic.[63]

Congress responded by enacting the Helms Amendment to the NEA authorizing statute. The Amendment barred the use of NEA funds to:

> [P]romote, disseminate, or produce materials which in the judgment of [the NEA] may be considered obscene, including but not limited to depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.[64]

In order to ensure compliance, the NEA adopted a requirement that every grantee certify in writing that it would not use NEA funds inconsistently with the Helms Amendment.[65] Two lawsuits were filed contesting the constitutionality of the certification requirement. The requirement was found to be unconstitutionally vague,[66] and the NEA, in settling the lawsuits, agreed to remove it.

The decency and respect clause was the result of a congressional compromise. It was adopted by Congress over two other proposals, one that would have largely eliminated the NEA and one that would have barred the funding of art that "has the purpose or effect of denigrating the beliefs, tenets, or objects of a particular religion" or

62. David Greene, *Piss Christ*, CENSORSHIP, A WORLD ENCYCLOPEDIA (London: Fitzroy Dearborn, 2001). Nothing but the title indicated the nature of the pigmentation. Senator Alphonse D'Amato famously tore up a reproduction of the photograph on the Senate floor, saying that "Serrano is not an artist. He is a jerk."

63. *Finley*, 524 U.S. at 574. The Corcoran Gallery in Washington, D.C., fearing controversy, canceled its scheduled exhibition of "The Perfect Moment." When the exhibit appeared at the Contemporary Arts Center in Cincinnati, director Dennis Barrie was arrested and tried on obscenity charges. Barrie was acquitted. JENNIFER A. PETER & LOUIS M. CROSIER, THE CULTURAL BATTLEFIELD: ART CENSORSHIP & PUBLIC FUNDING 155, 175 (Gilman, NH: Avocus Publishing 1995). HEINS, *supra* note 61, at 111-12.

64. *Finley*, 524 U.S. at 575.

65. *Id.*

66. Bella Lewitzky Dance Co. v, Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991).

"of denigrating an individual, or group of individuals, on the basis of race, sex, handicap, or national origin."[67]

The NEA's governing body, the National Council on the Arts, resolved to implement its new mandate by ensuring that members of the advisory panels that review and make funding recommendations on grant applications "represent geographic, ethnic, and aesthetic diversity."[68] No other regulation was promulgated to meet the amendment's requirements.

Prior to the enactment of the decency and respect clause, the NEA informed four performance artists, Karen Finley, John Fleck, Holly Hughes, and Tim Miller, the NEA4, that their grant applications had been rejected by the National Council overruling the recommendations of the advisory panels. Three months later, in September 1990, the four filed a lawsuit contending, among other claims, that their First Amendment rights had been violated because their applications were rejected on political grounds. In March 1991, after the decency and respect clause was enacted, the suit was joined by the National Association of Artists' Organizations (NAAO), a membership organization of artist-run organizations supporting new and emerging works, and the constitutionality of section 954(d)(1) was challenged directly. The NEA ultimately settled the individual artists' cases, that is, that the statute was applied unconstitutionally to them, by paying them the amount of the grants, damages and attorneys fees.[69]

All that remained for the courts to consider was NAAO's challenge that the statute was unconstitutional on its face.[70] On June 9, 1992, the federal trial court ruled that the decency and respect clause was unconstitutionally vague and overbroad and enjoined enforcement of the provision.[71] That ruling was affirmed by the Court

67. *Finley*, 524 U.S. at 576.

68. *Id.* at 577.

69. *Id.* at 577-78; PETER & CROSIER, *supra* note 63, at 30.

70. *Finley*, 524 U.S. at 577-78.

71. Finley v. NEA, 795 F.Supp. 1457, 1476 (C.D. Cal. 1992) [hereinafter *Finley I*]. Despite the fact that the agency was prohibited from enforcing the decency and respect clause, the pattern of controversial grants being denied funding over the recommendations of the advisory panels continued. The National Campaign for Freedom of Expression documented at least 12 such instances between June 1992 and June 1998. In one instance a National Council member cited the need to be "sensitive to the nature of public sponsorship" and respectful of "the clear message Congress has given." NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION, June 1998 at § S1-4.

During the same period of time, Congress continued to revise the Endowment's procedures and practices. Most notably, in 1996, Congress slashed the NEA's budget by 40%, eliminated almost all grants to individual artists, and prohibited non-project specific

of Appeals for the Ninth Circuit in 1996.[72] In each case, the court rejected the assertion that the NEA could comply with the decency and respect clause simply by ensuring diversity in its panels.[73]

The Supreme Court reversed and upheld the decency and respect clause as facially constitutional. The Court held that the decency and respect clause did not impose a categorical requirement. That is, it did not prevent the NEA from funding "indecent" or "disrespectful" art and did not require that any factor be considered for every grant.[74] And the Court held that there was no proof that the NEA did or would actually deny grants because of "indecency" or "disrespect."

But the Court did hold that if the NEA were to deny funding in an effort to suppress particular viewpoints that would be unconstitutional:

> If the NEA were to leverage its power to award subsidies on the "basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not aim at the suppression of dangerous ideas, and if a subsidy were manipulated to have a coercive effect, then relief could be appropriate. In addition, as the NEA itself concedes, a more pressing constitutional question would arise if government funding resulted in the imposition of a disproportionate burden calculated to drive certain ideas or viewpoints from the marketplace."[75]

In other words, the NEA may *consider* decency in awarding arts grants, but it cannot do much about it.[76]

Thus, at least in theory, the First Amendment protects an artist's right to create art expressing unpopular viewpoints, that is, works that some might find indecent or disrespectful, with the support of governmental subsidies.[77]

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funding such as seasonal and general operating support. Previously, the agency itself had eliminated the practice whereby arts organizations could sub-grant to individual artists. *Id.*

72. NEA v. Finley, 100 F.3d 671 (9th Cir. 1996) [hereinafter *Finley II*].

73. *Finley I*, 795 F. Supp. at 1471; *Finley II*, 100 F.3d at 680 (holding that the agency "has no discretion to ignore this obligation, enforce only part of it, or give it a cramped construction").

74. *Finley*, 524 U.S. at 580-581.

75. *Id.* at 587 (citations omitted).

76. The Court did note that there were a few specific contexts in which the NEA could exclude grants for indecent or disrespectful art such as school and youth programs. *Id.* at 581.

77. It must not be disregarded that the Supreme Court did rule against NAAO and the artists and that the relief these parties sought, the removal of the decency and respect clause, was not granted.

Indeed, there is much to dislike about the Court's opinion from both an artistic and legal standpoint. The Court based much of its holding on its perception that there was

The initial wire service stories that went out within minutes of the Court's release of the ruling grossly misreported this aspect of the decision. The Associated Press lead with "The government can deny cash grants to artists because their work is considered indecent, the Supreme Court ruled today."[78] Likewise, Gannett reported that "denying tax dollars to artists who present lewd or indecent material does not violate the rights of people to express themselves."[79]

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not a "realistic danger that § 954(d)(1) will compromise First Amendment values." *Id.* at 583. This conclusion is disturbing because it ignores the very real discouragement that artists feel to apply for grants for works that might cross someone's decency and respect line. And additionally, the Court justified this conclusion because it believed that "one could hardly anticipate how 'decency' or 'respect' would bear on grant applications." *Id.* Such unguided subjectivity, and vagueness in the First Amendment context is usually a basis for invalidating a statute, not approving one. However, the Court held that when "the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe" and thus Congress need not "legislate with clarity." *Id.* at 589. Moreover, the Court held that in the context of *competitive* governmental funding, the government could employ criteria that would not be permissible in other contexts. *Id.* at 585.

These points form the basis of the dissenting opinion by Justice Souter which largely adopted all of the positions set forth by NAAO and the artists. *Id.* at 600-23. As Justice Souter wrote:

> The decency and respect proviso mandates viewpoint-based decisions in the disbursement of government subsidies, and the Government has wholly failed to explain why the statute should be afforded an exemption from the fundamental rule of the First Amendment that viewpoint discrimination in the exercise of public authority over expressive activity is unconstitutional. The Court's conclusions that the proviso is not viewpoint-based, that it is not a regulation, and that the NEA may permissibly engage in viewpoint discrimination, are all patently mistaken.

Id. at 600-01.

78. Laurie Asseo, *OK Given not to fund indecent art*, ASSOCIATED PRESS, June 25, 1998, 11:44 Eastern Time *available at* http:// www.ap.org.

79. *Supreme Court allows for funding denial for lewd art*, GANNETT NEW SERVICE, June 25, 1998. A later story released the same day by the AP was somewhat less definitive. It opened: "The government need not subsidize art it considers indecent." Calvin Woodward, *Court Allows Limits on Art Funds*, ASSOCIATED PRESS, June 25, 1998, 4:02 p.m. EDT *available at* http://www.washingtonpost.com.

Prominent supporters of the decency and respect provision based their initial comments on the press reports instead of the decision itself. Newt Gingrich, then Speaker of the House of Representatives released a statement celebrating that "the Supreme Court validated the right of the American people to not pay for art that offends their sensibilities." And Jay Sekulow of the American Center for Law and Justice, the Pat Robertson-funded organization that had submitted a friend of the court brief urging the Court to uphold the decency and respect language, announced that "[t]he American people are no longer going to have their tax dollars used to fund filth." It was not until days later that the "victors" were more circumspect about the Court's ruling. *'Decency' Supporters Claim Victory: See Decision as Barring Funding for 'Indecent' Art*, NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION QUARTERLY, Summer 1998 at pp. S1, S4.

But these accounts were inaccurate. Indeed, as Justice Scalia, concurring in the Court's decision but disagreeing with its majority's reasoning, wrote:

> The operation was a success, but the patient died." What such a procedure is to medicine, the Court's decision is to law. It sustains the constitutionality of 20 U.S.C. §954(d)(1) by gutting it. The most avid congressional opponents of the provision could not ask for more.[80]

Justice Scalia, joined by Justice Thomas, believed that the decency and respect clause did indeed establish viewpoint and content based criteria for evaluating grant applications,[81] but that such criteria were not unconstitutional. He characterized the NEA's implementation of the statute as "so obviously inadequate that it insults the intelligence."[82]

However, the initial media spin proved to have great momentum. As Ellen Yaroshefsky, one of the lawyers representing the four artists that brought the lawsuit wrote:

> The most difficult fallout from the case is the media spin on the loss. Most people believe this decision to be a serious setback for free expression. The fear is that people will behave according to their perception of the Supreme Court's opinion and will censor themselves and the works that their institutions will sponsor.[83]

Arts advocates echoed the concern that not only had the Court failed to perceive a very real chilling effect that was already apparent, but that the decision, despite its reaffirmation of the constitutional protection due artistic expression, would serve only to enhance that effect.[84]

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80. *Finley*, 524 U.S. at 590.

81. "This is so apparent that I am at a loss to understand what the court has in mind (other than the gutting of the statute) when it speculates that the statute is merely 'advisory' . . . The law unquestionably disfavors—discriminates against indecency and disrespect for the diverse beliefs and values of the American people." *Id.* at 591.

82. *Id.* at 591. Further support for that characterization of the NEA's implementation procedure as being ineffectual came, albeit inadvertently, from the NEA itself. In a statement released after the Supreme Court's ruling, NEA Chairperson William Ivey said the decision would not change the Endowment's day to day operations. *Statement of William J. Ivey*, NATIONAL ENDOWMENT FOR THE ARTS, June 25,1998. However, the NEA had been enjoined by court order since 1992 from applying the decency and respect provision. *Finley I*, 795 F. Supp. at 1476.

83. Yaroshefsky, Ellen, *The Supreme Court Passes: No 'Realistic Danger' to First Amendment Freedoms Perceived*, NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION QUARTERLY, Summer 1998 at § S2.

84. *Justices Cold to 'Chilling Effect'; Arts Advocates: Real Effects of 'Decency' Rule Ignored*, NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION QUARTERLY, Summer 1998, at § S1-2. As NAAO's executive director, Roberto Bedoya said, "Now we are constrained by 'decency and respect,' but we don't know what these words mean. Instead we must guess, behave with caution and make publicly supported art subject to whims of

3. Proving that a Funding Decision Was Viewpoint Discrimination

Following *Finley*, it was assumed that it would be nigh impossible an arts organization actually to prove that the government has acted with the intent to suppress any particular viewpoint or content. There is likely to always be another reason, albeit pre-textual, that the government could offer and a court is likely to defer to the government's discretion in the absence of compelling evidence to the contrary.

The need to identify an improper motive is critical. In a case some twelve years earlier, a federal appeals court upheld the right of the Governor of New Hampshire to instruct the state arts commission to cancel a planned grant to a literary magazine. The magazine had received state funding the previous year and had published in one of its issues a poem that the Governor characterized as "filth."[85] The court, like the Supreme Court in *Finley*, held that in a competitive funding situation, the subjective distaste for artwork did not raise a constitutional issue. But, also like in *Finley*, the court acknowledged that evidence of "a pattern of discrimination" against certain speakers would "imping[e] on the basic first amendment right to free and full debate on matters of public interest."[86] The court noted further that "distribution of arts grants on the basis of such extrinsic considerations as the applicants' political views, associations, or activities would violate the equal protection clause, if not the first amendment, by penalizing the exercise of those freedoms."[87]

4. Esperanza and Proof of Discriminatory Intent

But barely six weeks after the Supreme Court handed down its decision in *NEA v. Finley,* the Esperanza Center filed a federal civil rights lawsuit against the city of San Antonio. Esperanza claimed that the city violated its First Amendment rights by indeed leveraging its local arts funding mechanism into a penalty against Esperanza because of the socio-political views expressed in Esperanza's presentations. Esperanza also claimed that the city violated the due process and equal protection provisions of the 14th Amendment by penalizing Esperanza's artistic expression because of its viewpoint

governmental powers. Members of the arts community which seek support from the NEA will once again be forced to self-censor." *Id.*

85. Advocates for the Arts v. Thomson, 532 F.2d 792, 793 (1st Cir. 1976).

86. *Id.* at 798.

87. *Id.* at 798 n.8.

and by discriminating against Esperanza without any rational basis and out of a desire to appease private animus.[88]

The City's position was not entirely without legal justification. The recognized political nature of art has subjected some works to challenges that they are inappropriate for display in places where the absence of political speech is important, such as courthouses. In these instances, government may be able to exclude such art as long as it does not discriminate against particular political viewpoints in choosing what art to exclude.[89]

The federal district court sided with Esperanza finding that the city had indeed impermissibly denied the group its funding.[90] In so doing, the Court rejected the city's contention that Esperanza, because of the political quality of its art, was not truly an arts group qualified to receive arts funding. As the court stated:

> We should be most wary whenever a government official undertakes to restrict speech because it is "too political." Labeling expression as "political" can often serve as a proxy for suppression of unfavored ideas. . . . The constitution requires viewpoint neutrality in order to prevent government suppression of controversial or otherwise disfavored ideas because the categorization of speech as "political" or "controversial" is usually determined according to the values and attitudes of the decisionmaker.[91]

Thus once again, the values inherent in our constitutional democracy support the role of art as a vehicle for political speech.

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88. Silva, *supra* note 49.

89. *Compare* Amato v. Wilentz, 753 F. Supp. 543, 558 (D. N.J. 1990), *vacated other grounds*, 952 F.2d 742 (3d Cir. 1991) (holding that Chief Justice could not deny use of courthouse to movie crew because of views expressed in film when permission had been granted to others) *with* Claudio v. United States, 836 F. Supp. 1219, 1228-30 (E.D. N.C. 1993) (holding that government could exclude political art as a category of content if it did not discriminate against viewpoints).

Some courts, however, have questioned whether "political" is a meaningful label to use. "Far too frequently the mantle of nonpartisanship is thrown over the shoulders of those who have been successful in obtaining political or economic power . . . while the pejorative 'political' is reserved for those who have been less successful." Lawrence Univ. Bicentennial Comm'n v. Appleton, 409 F. Supp. 1319, 1326 (E.D. Wis. 1976).

90. *Esperanza*, 316 F. Supp. 2d at 436.

91. *Id.* at 456-57. The Court also noted that city did not administer its "no political art" policy consistently. Several of the organizations that did receive city funding were not primarily arts organizations or sought funding for an art project with a political element to it.

Conclusion

The First Amendment to the United States Constitution recognizes that artistic and creative expression is an important medium of communication. As such, the right to create, display or view art is as protected as the right to speak.

The creation or performance of art differs however from other types of "expressive conduct." In other situations, the Supreme Court treats conduct as "speech," and thus protected by the First Amendment, only when such conduct communicates some type of understandable message. But with art, the conduct of creating or presenting art is seen as intrinsically part of the speech itself, regardless of whether it conveys a message that anyone would readily understand.

By protecting even unpopular and political artistic expression, our legal system in this way encourages artists to use their work to explore pressing and controversial issues. These ideals are both a recognition of art's important historical role in political discourse, and an affirmation that our democracy values artistic expression.